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STATE OF NEW MEXICO NEW MEXICO WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF: PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTATE WATERS, SECTION 20.6.4 NMAC.	)))))	**Docket No. WQCC 20-51 (R)**

JOINT CLOSING ARGUMENTS BY COMMUNITIES FOR CLEAN WATER AND THE GILA RESOURCES INFORATION PROJECT

Pursuant to the New Mexico Water Quality Control Commission's Rulemaking Procedures, 20.1.6.304 NMAC, Communities for Clean Water ("CCW") and the Gila Resources Information Project ("GRIP") hereby submit their closing arguments in the 2021 Triennial Review proceeding. Also pursuant to the Commission's Rulemaking Procedures, 20.1.6.304 NMAC, CCW and GRIP are submitting herewith a proposed statement of reasons.

The New Mexico Environment Department ("Department") proposes revisions to the New Mexico Standards for Interstate and Intrastate Waters, 20.6.4 NMAC, in a petition filed with the Water Quality Control Commission ("Commission") on August 19, 2020 under the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 to 74-6-17. CCW and GRIP generally support the petition, but propose a number of changes to the Department's proposal as discussed below. Several other parties have also proposed changes to the standards. CCW and GRIP oppose some of these proposals as also discussed below.

I. BACKGROUND

A. THE FEDERAL CLEAN WATER ACT

Congress enacted the Clean Water Act ("CWA"), originally the Federal Water Pollution Control Act, on October 18, 1972.[1] The express objective of the CWA, stated in section 101(a), "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the CWA set the goal of eliminating the discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a)(1). It set an interim goal of attaining water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water by 1983. 33 U.S.C. § 1251(a)(2). The Act also established a national policy of prohibiting the discharge of toxic pollutants in toxic amounts. 33 U.S.C. § 1251(a)(3). These goals, while still part of the law, have yet to be attained. Congress enacted major amendments to the CWA in 1977, 1982, and 1987.[2]

Section 303 of the CWA requires each state to develop water quality standards for waters within that state. 33 U.S.C. § 1313; *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005). Water quality standards have three components. First, states must specify designated uses for each body of water, such as public water supply, fish propagation, or agriculture. Second, they must establish water quality criteria for each body of water, which set a limit on the level of various pollutants that may be present without impairing the designated use of the water body. And third, states must adopt an antidegradation policy designed to prevent the water body from becoming impaired such that it cannot sustain its designated use. 33 U.S.C. § 1313(c)(2). The water pollution

1 Pub. L. No. 92-500, 86 Stat. 816 (1972).

2 Pub. L. No. 95–217, 91 Stat. 1566 (1977); Pub. L. No. 97-357 (1982); 96 Stat. 1712; Pub. L. No. 100-4, 101 Stat. 7 (1987).

control agency[3] of each state must at least once every three years "hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." 33 U.S.C. § 1313(c)(1).

Two other provisions of the Clean Water Act are pertinent to the implementation of water quality standards. First, the surface water quality standards are attained primarily through effluent limits and other conditions contained in surface water discharge permits – NPDES4 permits – issued by the United States Environmental Protection Agency ("EPA") under section 402 of the Clean Water Act. 33 U.S.C. § 1342. Second, under section 401 of the Clean Water Act, states must certify that any federal permit resulting in the discharge of pollutants into surface waters will comply with all state and federal standards. 33 U.S.C. § 1341.

B. THE NEW MEXICO WATER QUALITY ACT

The New Mexico Legislature enacted the Water Quality Act in 1967. The purpose of the WQA is "to abate and prevent water pollution." *Bokum Res. Corp. v. N.M. Water Quality Control Comm'm*, 93 N.M. 546, 555, 603 P.2d 285, 294 (1979). The WQA authorizes the Commission to adopt water quality standards for surface waters of the state. It provides that the Commission:

> shall adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act. The standards shall include narrative standards and, as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act. In making standards, the commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.

3 The Water Quality Act designates the Commission as the water pollution control agency for New Mexico. NMSA 1978, § 74-6-3.

4 National Pollutant Discharge Elimination System.

NMSA 1978, § 74-6-4(D).

C. THE WATER QUALITY STANDARDS

In accordance with the Clean Water Act and the Water Quality Act, the Commission has adopted surface water standards for interstate and intrastate surface waters in New Mexico. 20.6.4 NMAC. The express purpose of the regulations is to establish water quality standards that consist of the designated uses of surface waters, the water quality criteria necessary to protect the uses, and an antidegradation policy. 20.6.4.6.A NMAC. The regulations are also designed to meet the requirements of the federal Clean Water Act. 20.6.4.6.B NMAC.

D. THE PETITION

On August 19, 2020, the Department submitted a Petition for Regulatory Change to the Commission proposing various modifications to the standards and other amendments to the regulations. The Department filed an amended petition on March 12, 2021. Several other parties have also proposed various amendments to the regulations. CCW and GRIP have taken a position on some, though not all, of these proposed amendments, which we address below.

II. ISSUES

A. CLIMATE CHANGE

The first issue we address is climate change. The Department makes two proposals in its Petition to amend the regulations to address climate change. First, the Department proposes adding a new paragraph on climate change in the section setting forth the objectives of the regulations. Second, the Department proposes adding a new definition of climate change to the regulations. CCW and GRIP generally support both of these proposals, but have proposed minor revisions to make the regulations clearer and more effective.

The Department proposes adding the following new one-sentence paragraph D under section 20.6.4.6 NMAC, the "objectives" section, to address climate change: "These surface water quality standards serve to address the inherent threats to water quality due to climate change." NMED Ex. 9 at 1. As written, this sentence is more a statement of effect than one of objective or purpose, and it is somewhat conclusory. CCW and GRIP propose a slight revision: "A further purpose of these surface water quality standards is to address the inherent threats to water quality due to climate change." CCW-GRIP Revised Ex. 1 at 1; CCW-GRIP Ex. 5 at 5; 1 Tr. p. 261, lines 3-7. This sentence is expressly a statement of purpose, which would be more useful to the Department, to the Commission, and to reviewing courts in interpreting the regulations in the future. Courts regularly look to the purpose of a statute or regulation in discerning its meaning. *See, e.g., N.M. Dep't of Game & Fish v. Rawlings*, ¶ 6, 2019-NMCA-018 ("When interpreting a statute, a court's primary goal is to facilitate and promote the Legislature's *purpose*.") (emphasis added).

For clarity, the Department also proposes the following new definition of "climate change," to be added to section 20.6.4.7 NMAC, the definitions section:

> "Climate change" refers to any significant change in the measures of climate lasting for an extended period of time, typically decades or longer, and includes major changes in temperature, precipitation, wind patterns or other weather-related effects. Climate change may be due to natural processes or human-caused changes of the atmosphere, or a combination of the two.

NMED Ex. 110 at 3. The second sentence of this proposed definition, by using the disjunctive "or," effectively says that climate change could be due to *either* "natural processes" *or* "human-caused changes of the atmosphere." The words "natural processes" could easily be interpreted to mean such things as sunspots and perturbations in the Earth's orbit. The Department witness acknowledged these points during the hearing. 1 Tr. p. 153, line 23 to p. 155, line 14. CCW and GRIP believe the

Commission should not equivocate on the causes of climate change. CCW and GRIP thus offer the following proposed definition instead:

> "Climate change" refers to any significant change in the measures of climate lasting for an extended period of time, typically decades or longer, and includes major changes in temperature, precipitation, wind patterns or other weather-related effects. Climate change is due primarily to anthropogenic emissions of greenhouse gases into the atmosphere, in combination with natural processes.

CCW-GRIP Revised Ex. 1 at 1.

CCW and GRIP thus generally support the Department's proposal on climate change. But CCW and GRIP recommend that the Commission adopt somewhat revised statement of purpose and definition.

B. DEFINITION OF TOXIC POLLUTANT

The second issue is the definition of "toxic pollutants." The Department did not propose a change to this definition in the Petition. However, DOE and Triad have proposed to limit the definition to certain listed pollutants. The Department opposes this proposal. NMED Ex. ; Tr. CCW and GRIP also oppose this proposal, but offer an alternative.

The current definition of "toxic pollutant" in the regulations is a narrative one:

> "Toxic pollutant" means those pollutants, or combination of pollutants, including disease-causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairment or physical deformations in such organisms or their offspring.

20.6.4.7.T(2) NMAC. This definition is taken almost verbatim from the definition of "toxic pollutant" in section 502(13) of the Clean Water Act. 33 U.S.C. § 1362(13). DOE and Triad complain that the current definition creates uncertainty because it does not specify the particular pollutants that are regulated as "toxic pollutants." According to Bryan Dail, a DOE and Triad witness, "Without clearly stated criteria, it would be impossible to determine compliance with

the narrative water quality standards ("WQS") for CECs or evaluate reasonable potential in the context of an NPDES permit." Tr. To address this alleged defect, DOE and Triad propose the following revised definition of "toxic pollutant":

> "Toxic pollutant" means those pollutants, or combination of pollutants, listed by the EPA Administrator under section 307(a) of the federal Clean Water Act, 33 U.S.C. § 1313(a) [sic[5]] or in the list below.

LANL Ex. 1 at 3. There are no pollutants comprising a "list below," but the apparent intent is that the Commission would adopt a list of toxic pollutants – in addition to those listed by EPA – over time. *See* LANL Ex. 5 at 13. The proposal would eliminate the current narrative definition of "toxic pollutant." that has been in effect for years.

DOE and Triad overstate the uncertainty that could result under the current definition. Any enforceable requirement addressing a toxic pollutant must be set forth as an effluent limit or a monitoring and reporting condition in an NPDES permit. The permit specifies the particular toxic pollutant that is the subject of the requirement. *See, e.g.*, CCW-GRIP Ex. 7; AB Ex. 3 at 3. There really is no uncertainty.

Further, the procedural mechanism by which the Department adds an effluent limit for a toxic pollutant to an NPDES permit is through certification of the permit under section 401 of the Clean Water Act. 33 U.S.C. § 1341. To do so, the Department includes the effluent limit as a condition of certification. *See, e.g.*, AB Ex. 4. The Department needs to show that the subject pollutant meets the definition of "toxic pollutant." Both the Department's certification and the NPDES permit itself can be appealed. Under the Water Quality Act, "a person affected by the certification of a federal permit and who is adversely affected by such . . . certification may file a petition for review before the

5 Section 307(a) of the Clean Water Act, which addresses toxic pollutants, is codified at 33 U.S.C. § 1317(a), not § 1313(a).

[C]omission." NMSA 1978, § 74-6-5.O. And "a person . . . who participated in a[n] . . . appeal of a certification before the [C]omission and who is adversely affected by such action may appeal to the court of appeals for further relief." NMSA 1978, § 74-6-7.A. Indeed, DOE and Triad recently appealed the Department's certification of the NPDES permit for the Laboratory to the Commission. WQCC No. 21-16 (P). Similarly, under the Clean Water Act, any person can appeal an EPA action "in issuing or denying any permit under section [402]." 33 U.S.C. § 1369(b)(1).

CCW and GRIP nevertheless agree that including a list of pollutants in the definition of "toxic pollutants" is helpful. It would enhance certainty for all parties, and it would avoid unnecessary future arguments about whether those pollutants are or are not toxic. Therefore, CCW and GRIP have proposed adding the list of toxic pollutants from the EPA regulations, 40 C.F.R. § 401.15, and the list of toxic pollutants from the State groundwater regulations, 20.6.2.7.T(2) NMAC. in the definition. CCW-GRIP Revised Ex. 1; CCW-GRIP Ex. 5 at 5-6; 2 Tr. p. 619, lines 15-21. However, CCW and GRIP believe that the narrative portion of the definition needs to be retained. As Ms. Homer explained, "The narrative portion of the definition should continue to serve the function it always has: to allow flexibility to address a contaminant not currently on the list without waiting to go through a years-long regulatory revision." CCW-GRIP Ex. 5 at 6; Tr. CCW and GRIP therefore propose the following revised definition:

> "Toxic pollutant" means those pollutants, or combination of pollutants, including disease-causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairment or physical deformations in such organisms or their offspring. <u>The term includes the toxic pollutants listed in the federal regulations at 40 CFR 401.15, and the groundwater quality regulations at 20.6.2.7.T(2) NMAC as those lists may be amended.</u>

CCW-GRIP Ex. 1 at 1-2.

The Department generally supported the proposal of CCW and GRIP on this issue. 2 Tr. p. 448, lines 6-15. However, the Department witness erroneously stated that the definition proposed by CCW and GRIP "would limit the definition of toxic pollutants to those listed in 40 C.F.R. 401.15 and in the State's ground and surface water protection regulations in 20.6.2.7T.(2) NMAC." 2 Tr. p. 448, lines 19-23. The witness interpreted the word "includes" in the proposed definition as a limiting term, which it is not. The witness suggested adding the phrase "but is not limited to" after the word "includes." 2 Tr. p. 449, lines 4-6. Although this phrase would be redundant, CCW and GRIP agree to its addition as a matter of emphasis.

During the hearing, counsel for Triad asked Department witnesses whether they were familiar with judicial decisions that had reviewed historic versions of the Commission's definition of "toxic pollutant." In particular, counsel referenced the *Bokum Resources* case, in which the court "threw out the Commission's definition of 'toxic pollutant,'" and the *Kerr-McGee* case, in which the court "approved the Commission's amended definition of 'toxic pollutant.'" 2 Tr. p. 465, line 24 to p. 466, line 3. Presumably, Triad's point is that the original definition that the court found unlawful in *Bokum* did not include a list of contaminants, while the amended definition that the court approved in *Kerr-McGee* did. But the courts did not focus on the existence or non-existence of a list in either of these decisions, and neither decision suggests that there is any legal flaw in the current definition of "toxic pollutant" in the surface water regulations.

In *Bokum Resources Corp. v. N.M. Water Quality Control Commission*, 1979-NMSC-070, 93 N.M. 546, the New Mexico Supreme Court held that the original definition of "toxic pollutant" in the groundwater quality regulations was unconstitutionally vague. Under that definition, a "toxic pollutant" was a contaminant that would, "on the basis of information available to the director or the commission, cause death, disease," or other serious adverse health effects. *Id.* ¶ 7, 93 N.M. at 548.

Bokum argued that the phrase "on the basis of information available to the director or the commission" did not provide sufficient notice of what was required. The words "available" and "information" were unclear and potentially limitless. *Id.* ¶¶ 9, 11, 93 N.M. at 548-49. Based on this argument, the Court found this wording to be "unconstitutionally vague." *Id.* ¶ 33, 93 N.M. at 552. No such problem exists with the current definition of "toxic pollutant" in the surface water regulations.

In *Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Commission*, 1982-NMCA-015, 98 N.M. 240, the Court of Appeals upheld a revised definition of "toxic pollutant" in the groundwater quality regulations. Although the revised definition included a list of contaminants that are potentially – though not necessarily – toxic pollutants, Kerr-McGee challenged the definition as unlawfully vague because it provided that a listed contaminant would be a toxic pollutant only if present at a concentration shown to have toxic effects, but the definition did not specify that concentration. *Id.* ¶ 5, 98 N.M. at 243. The court looked in some detail at the procedure by which the regulations are implemented – through the issuance of groundwater discharge permits with specific permit conditions. That procedure included notice to the discharger, submittal of a proposed discharge plan, an opportunity for public comment and a public hearing, and the opportunity to appeal the final permit, first to the Commission and then to the courts. *Id.* ¶¶ 7-13, 98 N.M. at 243-45. The Department would include the requisite specificity in the discharge permit. Given this procedure, the court found that the lack of specificity in the regulatory definition was permissible. As the court explained:

> Although there are no numerical standards in the regulations for what concentration of compounds triggers the label "toxic pollutant," this is not detrimental to the dischargers. The Director will make those determinations *before* a discharge plan [i.e., permit] is approved or disapproved, and the discharger will be notified. The

> lack of numerical standards is, therefore, not a basis for finding the statute [sic] unconstitutional.

Id. ¶ 13, 98 N.M. at 245 (emphasis by the court). Nowhere did the court suggest that the presence of a list in the definition was determinative or even consequential to its conclusion.

C. EMERGING CONTAMINANTS

The third issue is the addition of a new term, "emerging contaminants" (or "contaminants of emerging concern"), to the regulations. The Department proposes to add a new definition of "contaminants of emerging concern" or "CECs," which would read as follows:

> "Contaminants of emerging concern" or "CECs" refer to water contaminants including, but not limited to, pharmaceuticals and personal care products that may cause significant ecological or human health effects at low concentrations. CECs are generally chemical compounds that, although suspected to potentially have impacts, may not have regulatory standards, and the concentrations to which negative impacts are observed have not been fully studied.

NMED Ex. 9 at 3. The Department also proposes to include "contaminants of emerging concern" in the criterion for toxic pollutants. As amended, the criterion would provide that "surface waters of the state shall be free of toxic pollutants, <u>including but not limited to contaminants of emerging concern and those toxic pollutants listed in 20.6.2 NMAC</u>," in harmful amounts or concentrations. NMED Ex. 9 at 17. Triad opposes these revisions. Triad Ex. 1 at 1, 11; Tr.

CCW and GRIP agree that emerging water contaminants, such as poly- and per-fluoralkyl substances or PFAS, pharmaceuticals, microplastics, and some ingredients of cosmetics, among other water contaminants, are creating serious water quality problems in New Mexico. Amigos Bravos Ex. 3 at 7-10. As Ms. Homer stated, the Environment Department needs to be able to require monitoring for emerging contaminants that are not currently on the Clean Water Act toxic pollutant list. CCW-GRIP Ex. 5 at 7. CCW and GRIP propose the following definition for "emerging

contaminants," which edits the Department's proposed definition slightly to use more consistent and precise terms:

> "Emerging contaminants" ~~Contaminants of emerging concern" or "CECs" refer to water~~ means contaminants, including~~,~~ but not limited to pharmaceuticals and ingredients in personal care products, that may cause significant adverse ecological or human health effects at low concentrations. ~~CECs~~ Emerging contaminants are ~~generally~~ chemical compounds that, although suspected to potentially have ~~impacts~~ adverse effects, may not have regulatory standards, and the concentrations to which ~~negative impacts~~ adverse effects are observed may not have ~~not~~ been fully studied. An emerging contaminant may be a toxic pollutant if it falls within the definition of that term.

CCW-GRIP Ex. 1 at 1. The Department's witness did not oppose these edits. 2 Tr. p. 442, lines 2-16.

In addition, Amigos Bravos has suggested adding poly- and perfluoralkyl substances (PFAS) to the definition as another example of an emerging contaminant. Thus, the second clause of the definition would read: "including~~,~~ but not limited to poly- and perfluoralkyl substances, pharmaceuticals, and ingredients in personal care products, ..." The Department concurred with the addition of PFAs to the definition. NMED Ex. 107 at 3; NMED Ex. 110 at 3; 2 Tr. p. 441, lines 3-17. CCW and GRIP support this addition.

CCW and GRIP do not propose changing the toxic pollutant criterion to include emerging contaminants. Melding the terms "toxic pollutant" and "emerging contaminant" in this way is apt to cause confusion. Nevertheless, it should be expressly stated that an "emerging contaminant" can be a "toxic pollutant" if the contaminant meets the "toxic pollutant" definition, either because it meets the narrative portion of the definition or because it has been added to one of the lists. That express statement is in the last sentence of the definition of "emerging contaminant" that CCW and GRIP propose (quoted above).

Finally, it should be expressly stated – as a clarification – that the Department has the authority to require monitoring of emerging contaminants. CCW and GRIP therefore propose the following new subsection F to section 20.6.2.13 NMAC: "F. An emerging contaminant shall be monitored if it may be present in effluent or receiving waters." CCW-GRIP Revised Ex. 1 at 2. The Department witness agreed with this proposed amendment. 2 Tr. p. 474, lines 12-18.

D. ANALYTICAL METHODS

The fourth issue is the monitoring requirements of the regulations. DOE and Triad propose to amend the regulations to limit monitoring requirements, for purposes of compliance and state certification, to analytical methods approved by the United States Environmental Protections Agency under the federal regulations at 40 C.F.R. part 136.

To effectuate this proposal, DOE and Triad would make three related revisions to the regulations. First, a new definition of the term "sufficiently sensitive" would be added to section 20.6.4.7.S NMAC:

> (5) "Sufficiently sensitive" means any method approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters for which (1) the method minimum level (ML) is at or below the level of the effluent limit established in the permit; or (2) the method has the lowest ML of the analytical methods approved under 40 CFR part 136 for the measured pollutant or pollutant parameter.

LANL Ex. 1 at 3. Second, section 20.6.4.12.E NMAC would be revised as follows:

> The commission may establish a numeric water quality criterion at a concentration that is ~~below the minimum quantification level~~ lowest minimum level (ML) of the analytical methods approved by EPA under 40 CFR part 136 for the measured pollutant or pollutant parameter. In such cases, the water quality standard is enforceable at the ~~minimum quantification level~~ ML of the sufficiently sensitive method approved by EPA under 40 CFR part 136.

LANL Ex. 1 at 10. Third, section 20.6.4.14.A NMAC would be revised to read, in relevant part:

> 40 CFR Part 136 approved methods shall be used to determine compliance with these standards and in Section 401 certifications under the federal Clean Water Act. In all other cases, sampling ~~Sampling~~ and analytical techniques shall conform with

> methods described in the following references unless otherwise specified by the commission pursuant to a petition to amend these standards: . . ..

LANL Ex. 1 at 12.

As several witnesses testified, this proposal, if adopted, would severely limit the authority of the Environment Department to require monitoring of certain toxic pollutants. In particular, the proposal would limit regulatory authority over polychlorinated biphenyls (PCBs) and per- and polyfluoralkyl substances (PFAS).

1. *Polychlorinated Biphenyls (PCBs)*

PCBs are highly toxic. AB Ex. 19 at 3. Consequently, the Commission has set the use-specific numeric surface water criteria for PCBs at 0.50 micrograms per liter (µ/L) for drinking water supply; 0.014 µ/L for wildlife habitat; 2 µ/L for aquatic life, acute exposure; 0.014 µ/L for aquatic life, chronic exposure; and 0.00064 µ/L for aquatic life, human health-organism only. 20.6.9.4.900.J NMAC.

According to David Hope, an analytical chemist who testified on behalf of Amigos Bravos, EPA has approved the Arochlor analytical method to detect PCBs under 40 C.F.R. part 136. AB Ex. 19 at 4. The most recent version is Method 608.3. *Id.* However, Method 608.3 is not capable of detecting PCBs at the lower levels of the State criteria – 0.014 µ/L and 0.00064 µ/L. *Id.* at 6-7; *see also* AB Ex. 22 at 4. The method detection limit for Method 608.6 is 0.065 µ/L. AB Ex. 19 at 7; *see also* AB Ex. 22 at 4.

Yet, as Mr. Hope also testified, there are accurate and reliable methods for detecting PCBs at the lower levels of the State criteria. In particular, the congener method, Method 1668C, has been published by EPA, and it is routinely used in analytic laboratories, but EPA has not added the method to the list at 40 C.F.R. part 136. AB Ex. 19 at 7. According to Mr. Hope, Method 1668C "is

the definitive method for low-level PCB analysis"; it "is sensitive and reproducible"; and it can more accurately detect all PCB compounds than Method 608.3. *Id*. at 7. Method 1668C can detect PCBs at the lower levels of the State criteria. The method detection limit for Method 1668C is (0.000007 to 0.000077 µg/L. *Id.* at 6; AB Ex. 22 at 4-5.

The Commission has the authority under State and federal law to require monitoring of PCBs using Method 1668C for compliance purposes. Moreover, federal Clean Water Act regulations provide:

> In the case of pollutants or pollutant parameters for which there are no approved methods under 40 CFR part 136 or methods are not otherwise required under 40 CFR chapter I, subchapter N or O, monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters.

40 C.F.R. § 122.44(i)(1(iv)(B) (2021).

2. *Per- and Polyfluoroalkyl Substances (PFAS)*

Although there are some 10,000 PFAS that have been synthesized, and most of them have not been evaluated, many have been evaluated and found to cause adverse health effects in humans. According to Dr. Jamie DeWitt, a toxicologist who testified for Amigos Bravos, these effects include possible carcinogenicity, liver damage, increased risk of thyroid disease, increased risk of asthma, and other adverse health effects. AB Ex. 17 at 6. Dr. DeWitt further testified that nine specific compounds that are PFAS should be treated as "toxic pollutants" as currently defined in the surface water regulations. *Id.* at 7-8; *see* 20.6.4.7.T(2) NMAC (definition of "toxic pollutant" quoted at p. 6 above).

EPA has not approved any methods for analysis of PFAS specifically under 40 C.F.R. part 136. As Dr. DeWitt testified, "40 C.F.R. part 136 does not include methods for sampling or analytical techniques specifically for PFAS." AB Ex. 17 at 6. Thus, under this proposal, the

Department could not require DOE or its contractors – through certification of the Laboratory NPDES permit or otherwise – to monitor for PFAS to comply with a permit effluent limit.

Yet, again, there are accepted and reliable methods for PFAS analysis. As Dr. DeWitt testified, EPA has developed and published several methods for testing PFAS in drinking water and surface water, including Method 537.1, which has been approved by the EPA Office of Research and Development. Method 537.1 has been used in New Mexico. AB Ex. 17 at 6-7.

Moreover, again, the Commission and the Department have the legal authority to require sampling and analysis of PFAS as part of the NPDES permit certification process.

CCW and GRIP strongly oppose the DOE and Triad proposal to limit sampling and analysis requirements to those methods approved by EPA under 40 C.F.R. § 136. As Elder Kathy Wan Povi Sanchez eloquently testified:

> I find these proposals to be very, very disturbing. As Native people and as rural people, our rivers and streams are very important to us. Water is life. We . . . rely on our waters for drinking, for irrigation, for livestock watering, for recreation, and for ceremonial purposes. Plants and fish and wild animals also need water for their sustenance, and they are part of our history and our culture. We want the water to be clean, and free of harmful chemical pollution.
>
> These chemical pollutants discharged into our waters are harmful to the health and well-being of the people who live near LANL and rely on local rivers and streams. They are harmful to the plants and animals that also rely on that water. They are particularly harmful to the most vulnerable among us: to pregnant women, to children, to the sick, and to the elderly. And these chemical pollutants are particularly harmful to the many members of our communities who have spent, or who will spend, their entire lives here, as the effects of these pollutants are cumulative over time.
>
> We have a right to know what chemical pollutants, and at what levels, LANL is discharging into canyon streams that flow along and near Pueblo lands into the Rio Grande.

CCW-GRIP Ex. 2 at 4. The Department, the Buckman Direct Diversion Board, and Amigos Bravos also oppose these proposals. *See* NMED Ex. 107; BDD Ex. 1; AB Ex. 11 at 1-6. We respectfully

urge the Commission to reject the DOE and Triad proposal to limit sampling and analysis requirements to those methods approved by EPA under 40 C.F.R. § 136.

E. CRITERIA FOR HEALTH OF HUMANS WHO INGEST FISH ("HH-OO")

The fifth issue is the water quality criteria established to protect the health of humans who ingest fish or other aquatic organisms from New Mexico surface waters. *See* 20.6.4.7.H(2) NMAC. These important criteria are saddled with the awful and indecipherable term "human health-organism only" or "HH-OO." DOE and Triad proposed the following revision to section 20.6.4.11 NMAC, which governs the application of these criteria:

> Human health-organism only criteria in Subsection J of 20.6.4.900 NMAC apply to those waters with a designated, existing or attainable ~~aquatic life~~ fish consumption use. If a tributary does not have an attainable fish consumption use, then HH-OO criteria do not apply to the tributary. If the fish consumption designated use is not attained in the first downstream segment with an attainable fish consumption designated use, then the tributary should be assigned a load allocation as required by 40 CFR Part 130. ~~When limited aquatic life is a designated use, the human health-organism only criteria apply only if adopted on a segment specific basis. The human health-organism only criteria for persistent toxic pollutants, as identified in Subsection J of 20.6.4.900 NMAC, also apply to all tributaries of waters with a designated, existing or attainable aquatic life use.~~

LANL Ex. 1 at 9.

This proposal would limit the criteria to only those waters with a "fish consumption" use. However, no surface waters in New Mexico have a designated "fish consumption" use, nor do the surface water standards identify such a use in section 20.6.4.900 NMAC. CCW-GRIP Ex. 5 at 9. Consequently, this proposal would eliminate the criteria from all waters in New Mexico. Yet these criteria have been adopted for 93 pollutants and currently apply to most surface waters in the State. CCW-GRIP Ex. 5 at 9. For these reasons, CCW and GRIP oppose this proposal. CCW-GRIP Ex. 5 at 9. The Department also opposed this proposal. NMED Ex. 107.

Based on the testimony of the Department and the CCW and GRIP witnesses, however, DOE and Triad have acknowledged that "our proposal did not accomplish its objective, which was to allow reasonable flexibility in the implementation of the HH-OO criteria while, importantly, still ensuring the protections to human health and the environment." 3 Tr. p. 810, line 18 to p. 811, line 22. DOE and Triad apparently are no longer making this proposal.

F. EVIDENTIARY ISSUES

Two evidentiary issues came up during the hearing for which we would like to provide some legal analysis. One issue goes to administrative notice; the other issue goes to opinion testimony by non-lawyers on the meaning of laws and regulations.

1. *Administrative Notice*

During the second day of the hearing, on July 14, 2021, counsel for Triad questioned whether the Hearing Office needed to take administrative notice of a provision of the New Mexico Administrative Code – section 20.6.2 NMAC – that had been referenced during cross-examination. 2 Tr. p. 606, lines 17-25. To resolve the question, the Hearing Officer prudently took administrative notice of section 20.6.2 NMAC. 2 Tr. p. 607, line 25 to. p. 608, line 5. The question whether this action was necessary was left open. 2 Tr. p. 608, lines 12-22.

So that it does not become an issue in future proceedings before this Commission, it is important to clarify that it is not necessary to take administrative notice of a published New Mexico (or federal) regulation, statute, or judicial decision. As our Supreme Court has said with respect to judicial notice, "judicial notice of law is the commonsense doctrine that the rules of evidence governing admissibility and proof of documents generally do not make sense to apply to statutes or judicial opinions – which are technically documents – because they are presented to the court as law,

not to the jury as evidence." *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 12, 147 N.M. 693, 696, 228 P.3d 477, 480 (citations and internal quotations omitted).

In an unpublished opinion, the federal district court in Montana stated, perhaps a bit more eloquently, that because "statutes, cases, and regulations are 'legislative facts' rather than 'adjudicative facts,' they are not appropriate for judicial notice." *Lemieux v. CWALT, Inc.*, 2017 U.S. Dist. LEXIS 10556, *2, 2017 WL 365481, *2 (D. Mont. 2017). Reviewing other federal cases, the court noted that "requests for judicial notice of legal authority" are "unnecessary," and that "it is not necessary to ask the court to judicially notice state and federal cases as legal precedent because the court routinely considers such legal authorities in doing its legal analysis without a party requesting that they be judicially noticed." *Id.* (citations and internal quotations omitted).

We believe these principles apply to this administrative proceeding. It is not necessary for the Commission or the Hearing Officer to take administrative notice of State or federal laws, regulations, or judicial decisions.

2. *Opinion Testimony on Adequacy of Public Notice*

During the third day of the hearing, on July 15, 2021, the Hearing Officer *sua sponte* (that is, on his own motion) objected to the Department's questioning of one of the Department's witnesses on the grounds that the question called for a legal conclusion. Counsel for the Department, on direct examination, asked Ms. Shelly Lemon if certain amendments proposed by DOE and Triad were "a logical outgrowth of the Department's petition and proposed amendments." 3 Tr. p. 723, lines 7-9. The witness responded in the negative, stating that "[t]he public would not have been able to reasonably anticipate the Commission adopting Triad and DOE's propos[al]" based on the public notice of the proceeding. 3 Tr. p. 723, lines 10-12. The Hearing Officer objected, stating that "I believe you're asking the witness a legal question." 3 Tr. p. 723, lines 17-20. Counsel for the

Department responded, and the Hearing Officer took the matter "under advisement." 3 Tr. p. 723, line 21 to p. 724, line 7. The Hearing Officer subsequently sustained the objection, thus effectively excluding the testimony. 3 Tr. p. 1030, lines 2-23.

As explained below, we respectfully submit that the Hearing Officer was in error in excluding this testimony. Although it is almost certainly harmless error in the context of this proceeding, we are nevertheless concerned that it might set a precedent that would need to be followed in future proceedings.

Preliminarily, the "logical outgrowth" requirement applies to agency rulemaking proceedings, and is designed to ensure that the public has adequate notice of the proposed regulations so that they can participate meaningfully. An agency can make changes to regulations that are different from, or in addition to, those originally proposed, so long as the changes are the "logical outgrowth" of the original proposal. Thus, "[a] final rule qualifies as a logical outgrowth of the proposed rule if interested parties should have anticipated that the change was possible." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080-81 (D.C. Cir. 2009) (internal quotations omitted). Counsel for the Department was seeking Ms. Lemon's opinion that the Triad and DOE proposal was not the logical outgrowth of the of the Department's initial proposal.

It is a legal truism that "[o]pinion testimony that seeks to state a legal conclusion is inadmissible." *New Mexico v. Clifford*, 1994-NMSC-048, ¶ 20, 117 N.M. 508, 513, 873 P.2d 254, 259. As our Supreme Court has explained, the justification for this maxim is that "[i]t is the exclusive province and responsibility of the court to tell the jury whether conduct falling within the evidence is or is not 'legal.'" *First Nat'l Bank v. Sanchez*, 1991-NMSC-065, ¶ 26, 112 N.M. 317, 324, 815 P.2d 613, 620; *accord Clifford*, ¶ 20. This justification is much less important where the court is the decision-maker, as several courts have noted. *See CFM Communs., LLC v. Mitts*

Telecasting Co., 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005) ("The concerns about admitting expert legal opinion may be lessened where, as here, a court sits as trier of fact."); *Martin v. Ind. Mich. Power Co.*, 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002) ("where the court is acting as the trier of fact, the dangers which can be presented by such 'ultimate issue' testimony are minimal if not nonexistent."). The justification is similarly unimportant where an administrative body – such as this Commission – is the decision-maker. There is no possibility for the court's exclusive role to be impinged.

Moreover, Ms. Lemon has expertise on this issue that would be useful to the Commission. Under the New Mexico Rules of Evidence:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

11-702 NMRA. Further, "[a]n opinion is not objectionable just because it embraces an ultimate issue." 11-704 NMRA. These rules, of course, do not apply in Commission proceedings, 20.1.6.300.A NMAC, but they can often serve as guidance. Ms. Lemon testified that she was Bureau Chief of the Department's Surface Water Quality Bureau, a position that she had held since March 2017. 1 Tr. p. 111, line 22 to p. 112, line 1. She also testified that before becoming Bureau Chief, she had worked in the Surface Water Quality Bureau since 2004. 1 Tr. p. 110, lines 1-22. Regarding the logical outgrowth, Ms. Lemon testified that in the course of her responsibilities she routinely reviewed draft public notices to determine their adequacy. 3 Tr. p. 73, line 18 to p. 74, line 6. Her specialized knowledge and experience on this issue, as well as her factual knowledge of this proceeding, puts her in a unique position to opine on whether the Triad and DOE proposals are a logical outgrowth of the Department's initial proposal. Because she is not a lawyer, hers is not a

legal opinion, but it is nevertheless an opinion that will help the Commission in understanding the evidence.

Finally, it is very common for agency witnesses to testify before this Commission and to explain and give opinions on the agency's interpretation of the laws and regulations that the agency administers, implements, and enforces. Indeed, courts often give deference to an agency interpretation of the laws and regulations the agency administers. CITE. Witnesses representing regulated parties also give such testimony. For example, in this proceeding a witness for Triad gave the following testimony:

> Q. [By Mr. Rose] Is it your understanding that the language you've proposed is required by federal law?
> A. [By Dr. John Toll] Yes.

3 Tr. p. 808, lines 6-8. There were no objections to this testimony.

CCW and GRIP do not take a position on the question whether the Triad and DOE proposals are the logical outgrowth of the Department's initial proposal. Nor do CCW and GRIP take a position on the question whether the logical outgrowth requirement even applies in a Triennial Review rulemaking. But CCW and GRIP urge the Commission to find that the testimony of Shelly Lemon on these issues is admissible opinion testimony.

V. CONCLUSION

For the foregoing reasons, Communities for Clean Water and the Gila Resources Information Project respectfully request that the Commission adopt their proposals on climate change; adopt their definitions of "toxic pollutant" and "emerging contaminants"; reject the DOE and Triad proposals on analytical methods; and reject the DOE and Triad proposals to revise the criteria to protect the health of humans who ingest fish and shellfish from New Mexico surface waters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September 2021, a copy of the foregoing Joint Closing Arguments by Communities for Clean Water and the Gila Resources Information Project was sent by electronic mail to:

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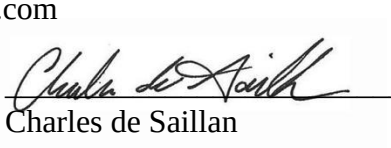

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